NO. 32555-5

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of Ronald Love:

STATE OF WASHINGTON,

Respondent,

v.

RONALD LOVE,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. ISSUES PRESENTED

A. Whether sufficient evidence supported the jury's verdict, where Love's mental abnormality and personality disorder were alternative means of proving he is mentally ill and each was supported by substantial evidence.

B. Whether the trial court had tenable reasons for admitting the former testimony of Love's victim A.P.

C. Whether the trial court correctly concluded that the SRA-FV dynamic risk assessment instrument meets the *Frye* test.

II. STATEMENT OF THE CASE

The State adopts Love's Statement of the Case in his Brief of Appellant (Br. of App.) at 3-10, supplemented by additional facts presented in the arguments below.

III. ARGUMENT

A. There Was Sufficient Evidence To Prove Love Suffers From A Mental Abnormality Or Personality Disorder

Love argues there was insufficient evidence to prove he suffers from a mental abnormality or personality disorder. He believes the jury should have been instructed to find that he suffers from a mental abnormality "and a personality disorder," instead of "or a personality disorder." He further asserts that he can raise this issue for the first time on appeal because it is of constitutional magnitude. Love's argument fails because the jury was properly instructed on alternative means and there was substantial evidence supporting those means. Furthermore, even if

there was error, Love invited it, and it was not a manifest error affecting a constitutional right.

1. Standard of Review

In reviewing the sufficiency of the evidence in a sexually violent predator (SVP) case, a reviewing court applies the criminal standard. *In re Detention of Thorell,* 149 Wn.2d 724, 744, 72 P.3d 708 (2003). "Under this approach, the evidence is sufficient if, when viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The court upholds the commitment if any rational trier of fact could have found the essential elements beyond a reasonable doubt. *In re Detention of Audett,* 158 Wn.2d 712, 727-28, 147 P.3d 982 (2006). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the appellant. *Id.* at 727. Appellate courts defer to the trier of fact regarding a witness's credibility, conflicting testimony, and the persuasiveness of the evidence. *In re Detention of Broten,* 130 Wn. App. 326, 335, 122 P.3d 942 (2005).

2. Sufficient Evidence Supported the Alternative Means

Love asserts there was insufficient evidence to continue his civil commitment because the Court instructed the jury to determine whether he suffers from, and is likely to commit sexually violent offenses because of,

a "mental abnormality or personality disorder." Br. of App. at 14-18 (citing CP 16 (Instruction 5)). Love does not dispute that there is sufficient evidence in the record to prove he suffers from both a mental abnormality and a personality disorder. He argues, however, that "the 'to commit' instruction required the jury to find the disjunctive in order to satisfy the third element." Br. of App. at 17.

Love cites no direct SVP authority for this proposition and Washington Courts have reached the opposite conclusion: Where there is testimony that the SVP suffers from both a mental abnormality and a personality disorder, and where substantial evidence supports each, the two conditions "are alternative means for making the SVP determination." *In re Detention of Halgren,* 156 Wn.2d 795, 810, 132 P.3d 714 (2006). *Halgren* found that, "[B]ecause both mental illnesses are predicates for the SVP determination, the two mental illnesses are closely connected." *Id.* Therefore, *Halgren* concluded, "[T]hese two means of establishing that a person is an SVP may operate independently or may work in conjunction." *Id.*

Consistent with *Halgren,* an argument similar to Love's was rejected by Division I in *In re Detention of Ticeson,* 159 Wn. App. 374, 246 P.2d 550 (2011). Ticeson, like Love, had been diagnosed with both a mental abnormality and a personality disorder. *Id.* at 388. The State's

expert testified that Ticeson's personality disorder caused him to have difficulty controlling his behavior. *Id.* at 378. While Ticeson did not contest either of the diagnoses, he argued on appeal that there was insufficient evidence to show that his personality disorder, standing alone, made him likely to reoffend. *Id.*

The Court of Appeals rejected this argument. Citing *Halgren,* the Court noted that the State's expert had testified that Ticeson's personality disorder causes him serious difficulty controlling his sexually violent behavior. Such testimony, this Court found, "is sufficient to allow a rational juror to find Ticeson's personality disorder makes him likely to reoffend." 159 Wn. App. at 389. As such, the Court found that there was substantial evidence to support either alternative means. *Id.*

Here, Love admits there was sufficient evidence for the jury to find either that he suffers from a mental abnormality or from a personality disorder. *See* Br. of App. at 22-24. Additionally, there was sufficient evidence for the jury to conclude that either condition causes Love difficulty controlling his behavior. The State's trial expert, Amy Phenix, Ph.D., explained how Love's mental abnormality impairs his volitional controls and causes him to have serious difficulty controlling his sexually violent behavior. 1RP 910-13. Regarding Love's personality disorder, Dr. Phenix testified:

> [I]t was such an integral part of his life, all of his life, from such a very early age throughout his adulthood. In terms of what is expressed in Mr. Love today, he still has antiauthority attitudes. He feels very victimized and is not in touch with the hurt and harm he's perpetrated on other people. He feels it's unjust that he is subject to exceptional circumstances to keep the community safe.
>
> He is so antisocial, in my opinion, that he can blame the victims who were so violated and traumatized in a blink. He completely externalizes responsibility, and, for example, accuses [A.P.] and [G.L.] of being prostitutes that he prostituted in the community, so those kind of attitudes that can allow you to re-victimize your victims are quite antisocial in nature.

1RP 907; *see* 1RP 1472 (rape victims A.P and G.L. were supposedly Love's "prostitutes"); 1RP 1432-37 (attempted rape victim D.L. supposedly sexually assaulted Love). Thus, she opined, Love's personality disorder "doesn't allow him to have the stops that a normal person would have" and it "allows him to violate the rights of others so in that way it contributes to his sexual offending." 1RP 913. Even Love's expert, Dr. Robert Halon, provided the jury with evidence to support a finding that Love's antisocial personality disorder made him sexually dangerous:

> Most sex crimes are committed by just plain criminals. They just – they treat people like they treat everything else when they are criminals. Take what they want when they want it. Don't give a damn. They are first. *You know, a lot of antisocial people are like that.*

1RP 1662 (emphasis added).

Such testimony is sufficient under *Halgren* and *Ticeson* and provided substantial evidence for the jury to find that either or both conditions made Love likely to reoffend. *Halgren,* 156 Wn.2d at 810. Sufficient evidence supported the alternative means and there was no instructional error.

3. Any Error was Invited and was Not Manifest Constitutional Error

Assuming *arguendo* that Jury Instruction No. 5 was error, it was an error that Love invited the Court to make. Jury instruction No. 5 was consistent with Washington Pattern Instruction (WPI) 365.34,[1] which includes "or" but not the option for the conjunctive "and" between "mental abnormality" and "personality disorder." The pattern instruction

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[1] WPI 365.34 (SVP Unconditional Discharge Elements):

To establish that (name of respondent) is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

(1) That respondent was previously found to be a sexually violent predator;

(2) That respondent continues to suffer from a [mental abnormality] [or] [personality disorder] which causes [him] [her] serious difficulty controlling [his] [her] sexually violent behavior; and

(3) The [mental abnormality] [or] [personality disorder] continues to make respondent likely to commit predatory acts of sexual violence unless confined to a secure facility.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that respondent continues to be a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of one or more of these elements, then it will be your duty to return a verdict that the respondent is no longer a sexually violent predator.

and jury instruction No. 5 are also consistent with definition of "sexually violent predator" in RCW 71.09.020(18),[2] which also includes "or" and not "and" between the two terms.

When Love proposed a "to commit" instruction that changed "continues to suffer" to "currently suffers," his proposal also included the word "or" between the two alternative means:

> Well, my suggestion is, Your Honor, is that we modify this instruction, that, "Ronald Love *currently* suffers from a *mental abnormality or personality* which causes him serious difficulty controlling his sexually violent behavior." That's what we're really here to make a determination on.

1RP 1817 (emphasis added).

Under the doctrine of invited error, a party may not materially contribute to an error of law at trial and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The record reflects that Love himself proposed the very language to which he now assigns error. This Court should decline to address his argument because Love invited any error in the instruction.

Love also should not be allowed to raise this argument on appeal because he does not identify a "manifest error affecting a constitutional

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[2] RCW 71.09.020(18):

"Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

right." RAP 2.5(a)(3); *State v. Walsh,* 143 Wn.2d 1, 7, 17 P.3d 591 (2001). Not all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3): "The exception actually is a narrow one, affording review only of 'certain constitutional questions.'" *State v. Scott,* 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988) (*Scott* II). Exceptions to RAP 2.5(a) must be construed narrowly. *WWJ Corp.,* 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). Love must first identify a constitutional error and then show how it actually affected his rights at trial. It is that showing that makes the error "manifest." *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Even if a court determines that a claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *Id.* at 333.

Here, the instruction was consistent with the statute, the WPI, *Halgren*, and the evidence presented. Love cannot show that the instruction in any way affected the outcome of the trial. Therefore there was no error, and certainly not a manifest constitutional error.

Love argues that his counsel was ineffective for not objecting to the instruction. Br. of App. at 27. In fact, as the record demonstrates, Love's counsel actually proposed a "to commit" instruction that included the word "or" to which Love now objects. In any event, Love's counsel was not ineffective. To prove ineffective assistance Love must show that

his counsel performed below an objective standard of reasonableness and he was prejudiced. *In re Detention of Stout*, 159 Wn.2d 357, 377, 150 P.3d 86 (2007). Courts reviewing such claims begin by assuming that counsel's assistance was effective, and the claimant bears the burden of showing otherwise. *Id.* Here, Love's counsel, like counsel for the State and the trial court, relied on the statutory language, the WPI, and *Halgren* and believed that the instruction's inclusion of the word "or" was correct. Love's counsel was not ineffective where such significant authority supported their decision.

B. The Trial Court Did Not Abuse Its Discretion When It Admitted The Former Testimony Of A.P.

Love argues that the trial court abused its discretion by admitting the former testimony of Love's victim A.P.,[3] pursuant to ER 804(b)(1). Br. of App. at 29. For the reasons argued below, this Court should conclude that, based on the totality of the facts of this case, the trial court did not abuse its discretion by finding A.P. to be an unavailable witness under ER 804(a)(5), and admitting her former testimony. Alternatively, if there was error, it was harmless.

[3] In 2005 A.P. testified under her maiden name and is identified elsewhere as "A.T." In 2014 the parties referred to her as "A.P.," her married name.

1. Standard of Review

The admission of testimony under ER 804(b)(1) is within the discretion of the trial court. *Acord v. Pettit*, 174 Wn. App. 95, 104, 302 P.3d 1265 *review denied*, 178 Wn.2d 1005, 308 P.3d 641 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

2. Former Testimony as a Hearsay Exception Under ER 804(b)(1) and 804(a)(5)

ER 804(b)(1) provides that a witness's former testimony is an exception to the hearsay rule if the witness is unavailable.[4] Pertinent to this case, a witness is unavailable under ER 804(a)(5) if she is absent from the trial and the State is unable to procure her attendance by "process or other reasonable means."[5] "Process or other reasonable means" has been

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[4] ER 804(b)(1) provides:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[5] ER 804(a)(5) provides:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

. . . . .

interpreted as requiring that, where a witness's attendance cannot be obtained by subpoena, the party offering the testimony "should at least be required to represent to the court that it made an effort to secure the voluntary attendance of the witnesses at trial." *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987) (citing K. Tegland, 5A Wash. Prac., *Evidence* § 393, at 271 (2d ed. 1982)).

3. Love's Victim A.P. was "Unavailable" Under the Totality of the Facts of this Case

In 1978 Love was charged by a seven-count criminal complaint with rape, oral copulation, sodomy, and burglary for offenses against A.P. and G.L., all of which he committed on the evening of October 28, 1978. Ex. 1 (attached as App. 1). He pled guilty to two counts of forcible rape, one for each victim. Ex. 2 (attached as App. 2).

In 2005, A.P. travelled from Puerto Rico to testify at Love's first SVP bench trial in the Pasco, Washington courtroom of the Honorable Robert G. Swisher. 1RP 1024-27. A.P. testified about being raped by Love in 1978:

> The court heard testimony from one of Mr. Love's victims who recalled in vivid detail his assault on her almost 30 years prior. Mr. Love was a stranger to this woman when

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(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

> he pushed his way into her California home in 1978; stripped her naked; orally, anally, and vaginally raped her; threatened to bash in her head; and spoke of kidnapping her before she escaped to a neighbor's home as Mr. Love followed, cursing her.

In re Detention of Love, 2007 WL 1087558, at *3.

The record does not reflect any efforts by the State to have A.P. voluntarily travel from Puerto Rico to Pasco a second time and, in candor towards the Court, no such efforts occurred. Under oath at the 2014 trial, and despite having pled guilty to forcibly raping A.P. in 1978, Love denied having ever committed a sexual offense. 1RP 810; Ex. 2. He told the jury, falsely, that A.P. had been one of his prostitutes. 1RP 1472. In fact, A.P. had worked for the Superior Court and the District Attorney in Modesto, California. *See* CP ___ (Sub No. 519, Verbatim Report of Proceedings, May 22, 2005, Testimony of A.P., at 88-89).

Based on these facts, the Court should conclude that the trial court did not abuse its discretion and that A.P. was unavailable to testify a second time. The State has not found a case with similar facts, or a holding that is on point. Nevertheless, it contravenes public policy protecting sexual assault victims, as well as common decency, to require the victim of a violent sexual assault to travel from outside the country a second time

to testify about the details of her violent sexual assault.[6] A.P.'s testimony was needed a second time because of Love's anticipated perjury, his defamation of A.P. and his denial of a crime that he had previously admitted committing. Love already had the opportunity to depose A.P. and then cross-examine her at the 2005 bench trial. In fact, had the State offered A.P.'s 2005 deposition transcript instead of her trial testimony, that very similar testimony would have been admissible under CR 32(a)(3)(B).[7] It defies logic that one transcript would be admissible while the other would not be. Furthermore, Love does not have a Sixth Amendment right of confrontation in this civil case. *Stout*, 159 Wn.2d at 368. Nor does he have a due process right to confront a live witness at an SVP trial. *Id.* at 372.

These facts are more compelling than a blanket policy that requires a party to seek repeat travel and testimony from the victim of a violent sexual assault who lives outside the country. Such a blanket policy cannot

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[6] *See*, e.g., RCW 70.125 (Victims of Sexual Assault Act); 9A.44.020 (rape shield statute).

[7] CR 32(a)(3)(B) provides:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

. . . . .

(B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule[.]

in every case constitute "reasonable means" as that term is used in ER 804(a)(5). Judge Swisher, a venerable superior court judge, observed and listened to A.P.'s testimony in 2005 and found her credible. CP ____ (Sub No. 205, attached as App. 3: Findings of Fact, Conclusions of Law and Order of Commitment, August 18, 2005, at 1 (Finding of Fact No. 2)). At the 2014 trial the State informed Judge Swisher that A.P. resided in Puerto Rico and had in fact travelled from that territory in 2005 to testify. 1RP 1024-27.

Given the factors above, Judge Swisher was within his discretion to admit A.P.'s former testimony under ER 804(b)(1), notwithstanding a record silent as to whether he considered those factors. This Court may affirm Judge Swisher "on any theory supported by the record and the legal authorities even if the trial court did not consider or mainly consider such grounds." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460-61, 45 P.3d 594 (2002), *as amended* (June 6, 2002). This Court should recognize the facts of this case as an exception to the usual blanket requirement of attempting to obtain a witness's voluntary attendance at trial.

4. Any Error was Harmless

Evidentiary error warrants reversal only where there is a reasonable probability that the error materially affected the outcome of the

trial. *In re Detention of West,* 171 Wn.2d 383, 410, 256 P.3d 302 (2011). Here, the evidence at issue was about one specific crime out of several violent crimes Love committed, and the jury heard essentially the same facts from Dr. Phenix as from A.P.'s former testimony. The jury heard evidence about other sexual crimes Love committed from 1973 through 1991. Given the abundance of this other evidence about Love's criminal sexual behavior, there is no reasonable probability that the verdict would have been different if the substantive evidence of a single crime, which was testified to by Dr. Phenix, had been excluded.

a. The Testimony of Dr. Phenix and Other Evidence of Love's Criminal Sexual History

Dr. Phenix diagnosed Love as suffering from a rape disorder known as Other Specified Paraphilic Disorder, Nonconsent. 1RP 869. It was essentially the same diagnosis she had assigned him in 2004, from an earlier version of the diagnostic manual. 1RP 875; *Love*, 2007 WL 1087558, at *3. She also diagnosed him again with antisocial personality disorder. 1RP 902-907; *Love*, at *3. To explain the bases of her diagnoses to the jury, Dr. Phenix provided lengthy testimony, under ER 705, recounting details of Love's sexual crimes and other evidence she had relied upon. 1RP 878-91.

(1) Sex Perversion, Stanislaus County, 1973

Dr. Phenix told the jury that in 1973, when Love was 16 years old, he attempted to force a six-year-old boy to orally copulate him. 1RP 878-79. For this offense Love was sent to the California Youth Authority. 1RP 879. The jury also had substantive evidence of this crime and the adjudication in Love's Judgment and Sentence for his 1991 Attempted Rape First Degree conviction, which documented his 1973 adjudication for "Sex Perversion." Ex. 6 at 2 (attached as App. 4).

(2) Sodomy and Assault with Intent to Commit Rape, Stanislaus County, 1975

Dr. Phenix next told the jury that in 1975, when Love was 18 years old, he sodomized a juvenile male and attempted to rape a juvenile female. 1RP 879. For those offenses he received a psychiatric evaluation and remained in juvenile custody. 1RP 879. Dr. Phenix emphasized to the jury that these crimes and the prior one showed that Love was developing a pattern of coercive sexual behavior at a young age, that it was escalating, and that his victim pool was widening. 1RP 879-80. The jury again had substantive evidence of these crimes and adjudications in Love's 1991 Judgment and Sentence, which documented his 1975 adjudications for "Sodomy" and "Assault with intent to commit rape." App. 4 at 2.

(3) Unadjudicated Attempted Kidnapping with Sexual Motivation, Stanislaus County, 1978

Dr. Phenix next told the jury that late one night in 1978, when Love was 20 years old, he and two accomplices entered the home of a 16-year-old girl who had rebuffed Love's advances. 1RP 880. Love tried to abduct the girl, threatening that he and his accomplices would rape her if she did not come with them. 1RP 880. Dr. Phenix opined that this was likely a sexual crime thwarted by the girl's mother, who, armed with a meat cleaver, chased the assailants from the home. 1RP 880.

(4) Forcible Rape of G.L, Stanislaus County, 1978

Dr. Phenix told the jury that in 1978, Love, his girlfriend and others were in a car when they came across an acquaintance, 27-year-old G.L. 1RP 880-81. They picked her up and, while driving to a party, the car ran out of gas. 1RP 881. When one passenger began vomiting and Love began kissing his girlfriend, G.L. left the car and walked away. 1RP 881. Love followed her, using the ruse that he would help her get gas. 1RP 881. He then attacked her, dragged her down a hill, and asked her whether she had ever been raped or "screwed in the ass before?" 1RP 882. Love forced G.L. to orally copulate him and then raped her anally and vaginally. 1RP 882. Dr. Phenix opined that Love's questions to G.L. were part of his

deviant arousal system and meant to terrify and degrade his victim. 1RP 883.

(5) Forcible Rape of A.P., Stanislaus County, 1978

Dr. Phenix then told the jury about Love's crime against A.P. 1RP 884. She described how Love learned about A.P. and her address from sharing a jail cell with her boyfriend. 1RP 884-85. Love knew he would be released before A.P.'s boyfriend, and that A.P. would likely be home alone. 1RP 884-85. Dr. Phenix noted that Love's rape of A.P. occurred on the same night as, and within about 30 minutes of, his rape of G.L. 1RP 880-81. She described how Love used a ruse and forced his way into the house, threatening that others outside the home wanted him to rape her or, if he did not, they would blow up the house. 1RP 885. He made A.P. put her growling dog in the bathroom. 1RP 885. Love forced her to disrobe and she cried throughout the ordeal that followed. 1RP 885. He forced her first to orally copulate him. 1RP 885. He then anally raped her, tearing her rectum so that she afterward required medical treatment. 1RP 885. Then Love vaginally raped her. 1RP 885.

In support of her diagnoses and risk assessment, Dr. Phenix noted that Love responded to A.P.'s pleas by threatening to bash her head in, by threatening to rape her all night and, despite her crying and begging him to

stop, he remained aroused and penetrated her in multiple ways. 1RP 886. She then noted the consistencies with Love's rape of G.L.: They were both prolonged sexual assaults that were particularly violent in nature, they were demeaning and painful to the victims, and Love could stay aroused throughout, which is "highly abnormal for normal men." 1RP 886.

(6) Attempted Rape First Degree, Franklin County, 1991

Love's committed his last sexual assault in the community in 1991 when he attempted to rape 19-year-old D.L., a male. 1RP 889. Dr. Phenix told the jury that Love left a group of people to follow D.L. to the store. 1RP 889. After jumping a fence in back of the property, Love attacked D.L. suddenly, forcing him to the ground and making him take his pants off. 1RP 889. He forced D.L. to spread his legs and said he was going to rape him. 1RP 889. Love was very violent, hitting D.L. in the face and body, and threatening that he had a gun and would shoot him. 1RP 889. Afterward, D.L. had bruises and lacerations on his face. 1RP 889-90. Dr. Phenix opined that Love is "aroused to violence combined with the sexual assault, the control, the degradation of his victims . . . that's his arousal pattern[.]" 1RP 890.

D.L. testified. 1RP 784-804. He was 19 years old in 1991 and late one afternoon he and a friend visited some people his friend knew at a

Pasco apartment. 1RP 785-86. He had never met Love, who suddenly showed up at the apartment. 1RP 786-87. Love acted strange and was intimidating; he talked about being in prison and showed the young men his swastika tattoos. 1RP 787, 790. Love left, came back later and was acting "weird." 1RP 790-91. He whistled at a young man who came out of a room without a shirt on; he walked around him and looked at him. 1RP 791. Love asked if they could get some beer, and D.L. and his friend agreed and started to put their coats on. 1RP 791. But Love wanted only D.L. to go with him and, because they were scared of Love, they complied. 1RP 791-92.

As Love and D.L. slipped through a fence on their way to the Jackpot store, Love suddenly grabbed D.L. by the hair, threw him to the ground and began beating him while threatening to kill him. 1RP 792. Love kept putting his hand down the front of D.L.'s pants and ordered him to take them off. D.L. did so because he was afraid Love had a knife or gun and would kill him. 1RP 793. Love ordered D.L. to spread his legs; he rubbed D.L.'s anus and said he was going to "fuck [him] in the ass." 1RP 794. Love then told D.L. to masturbate himself, and if he didn't, Love said he would "stomp [his] face in the ground." 1RP 794. D.L. complied. 1RP 794. Love then said he was going to "suck [his] dick." 1RP 794. Love took his watch and wallet. 1RP 795. At some point Love suddenly told

D.L. to "get the fuck out of" here. 1RP 794. D.L. ran without his pants to a store and reported what had happened. 1RP 795.

b. Because A.P.'s Former Testimony was Repeated by Dr. Phenix and was only a Small Portion of the Evidence, There is no Reasonable Probability it Materially Affected the Outcome of the Trial

At trial, the State had the burden to prove that: (1) Love was previously found to be an SVP; (2) he continues to suffer from a mental abnormality or personality disorder which causes him serious difficulty controlling his sexually violent behavior; and (3) his mental abnormality or personality disorder make him likely to commit predatory acts of sexual violence if he is not confined. CP 16 (Instruction No. 5). The State did not have to prove that Love raped A.P. The details of that rape were meaningful as evidence supporting Dr. Phenix's opinions. But Dr. Phenix discussed all the salient features of A.P.'s rape in her testimony, so the jury heard all the same details through Dr. Phenix and, more importantly, how those facts helped demonstrate that Love is still mentally ill and dangerous. Furthermore, A.P.'s rape was only one of at least six sexual crimes the jury learned Love perpetrated. The rape of G.L. the same night was at least as violent. The crimes and attempted crimes Love committed against a six-year-old child and two juveniles were probably more

prejudicial than any others, except perhaps for the attempted rape of D.L., which was bizarre and bloody.

In fact, Love himself argued to the trial court that A.P.'s testimony was cumulative. Love took the position that the jury had already heard Dr. Phenix testify about A.P.'s rape and A.P.'s description of it "merely emphasizes or accents what's already been testified to." 1RP 1023. Love's counsel argued:

> We've already heard a summary from Dr. Phenix as to what she reported in detail. This deposition -- well, deposition -- this testimony from her doesn't -- merely emphasizes or accents what's already been testified to. So, one, we object to it as being cumulative and unnecessarily prejudicial. They have already had this testimony in.

1RP 1023.

The State argued that the testimony was not cumulative because A.P.'s testimony was substantive while Dr. Phenix's was admitted under ER 705. That does not, however, change the fact that the jury already heard from Dr. Phenix all the relevant details as they applied to Love's mental state and recidivism risk.

This case is similar to *State v. Scott*, 48 Wn. App. 561, 739 P.2d 742 (1987) (*Scott* I) *aff'd, Scott* II, 110 Wn.2d 682. In *Scott* I, the State obtained a perpetuation deposition of a witness and then released him from his subpoena. 48 Wn. App. at 563. At trial, the defense objected

that the witness was not "unavailable," but the trial court admitted the deposition testimony. *Id.*

On appeal, the admission of the testimony under ER 804(b)(1) was held to be error because the State's releasing the witness from the subpoena was not a good faith effort to obtain the witness's attendance at trial. *Id.* at 564-66. Importantly, however, *Scott* I was a criminal case where the defendant had a Sixth Amendment right of confrontation, and the harmless error test for a constitutional violation required that the error be harmless beyond a reasonable doubt. Nevertheless, even under that heightened standard, the admission of the testimony was still harmless error. *Id.* at 566-67 (citing *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 24 A.L.R.3d 1065 (1967); *State v. Evans,* 96 Wn.2d 1, 4, 633 P.2d 83 (1981)). *Scott* I so held because, within the totality of evidence at trial, the testimony did not materially affect the outcome. *Id.*

That same analysis applies here, under the lower non-constitutional standard. The jury began by learning that Love had already been adjudicated to be a sexually violent predator in 2005. Ex. 7. Then there was an extraordinary amount of evidence, including expert testimony recounting the facts contained in A.P.'s former testimony, such that there

is no reasonable probability that the verdict would have been different. Any error was harmless.

C. The Trial Court Correctly Concluded That The SRA-FV Meets The *Frye* Test

1. Standard of Review.

Admission of evidence under *Frye*[8] is reviewed de novo. *State v. Baity,* 140 Wn.2d 1, 9-10, 991 P.2d 1151 (2000). In determining if novel scientific evidence satisfies *Frye,* the court may conduct "a searching review which may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority." *State v. Copeland,* 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996) (citing *State v. Cauthron,* 120 Wn.2d 879, 887-88, 846 P.2d 502 (1993) (*overruled in part on other grounds by State v. Buckner*, 133 Wn.2d 63, 65-66, 941 P.2d 667 (1997))).

Under *Frye,* "evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community." *State v. Martin,* 101 Wn.2d 713, 719, 684 P.2d 651 (1984). "The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology." *Cauthron,* 120 Wn.2d at 889.

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[8] *Frye v. United States*, 293 F. 1031, 34 A.L.R. 145 (D.C. Cir. 1923).

2. Introduction to the SRA-FV

The Structured Risk Assessment – Forensic Version (SRA-FV) is an assessment tool that provides evaluators of sexual offenders a structured method for considering risk factors that they formerly considered using only their clinical judgment. The SRA-FV incorporates factors empirically correlated with sexual recidivism, weights them according to their relative correlations, and allows evaluators to consider weight based on empirical research rather than subjective clinical judgment. The tool provides a framework for consistency and has been shown to increase the predictive accuracy of the Static-99, an actuarial instrument universally accepted as the best instrument in the field. In fact, the developers of the Static-99 recommend use of the SRA-FV in sex offender evaluations. The SRA-FV was researched, developed and published using the same methodology underlying all the tools that are commonly used and accepted in the field of sex offender evaluation.

Love challenged the State's expert's use of the SRA-FV. The trial court held a *Frye* hearing, based on the holding in *In re Detention of Ritter*, 177 Wn. App. 519, 312 P.3d 723 (2013). Following that hearing, the trial court entered findings of fact and conclusions of law, and concluded that the SRA-FV satisfied the requirements of *Frye*. CP 2-5. The court found that the use of dynamic

risk factors in sex offender evaluations is supported by a scientific theory that is generally accepted in the relevant scientific community. The trial court further found that a structured analysis of risk factors is supported by a scientific theory generally accepted in the scientific community. The court specifically determined that the SRA-FV is capable of producing reliable results, and that any limitations or potential errors due to limited number of cross validation studies or inter-rater reliability issues are matters for the trier-of-fact to assess. CP 5. Love argues that the SRA-FV is inadmissible because it does not purport to be a perfect predictor of sexual recidivism. As the trial court correctly found, Love's arguments go to weight and not admissibility. The findings of the trial court should be affirmed.

Additionally, Division II of this Court has recently determined that the scientific theories and principles upon which the SRA-FV is based have gained general acceptance in the scientific community and generally accepted methods of applying the instrument exist, such that it is capable of producing reliable results. *In re Detention of Pettis,* 188 Wn. App. 198, 352 P.3d 841 (2015). This Division of the Court should come to the same conclusion.

3. Risk Assessment In SVP Evaluations.

SVP proceedings under RCW 71.09 require assessment of a person's risk of sexually reoffending. RCW 71.09.020(18). The Washington State Supreme Court (WSSC) long ago approved the use of both clinical judgment and actuarial instruments in such risk assessments, and has held that neither requires a *Frye* hearing. *Thorell*, 149 Wn.2d at 756. Risk assessment has evolved over the past few decades, and expert use of actuarial instruments and other risk assessment measures has changed as the science has developed. 1RP 522-23, 527-35.

The actuarial instrument that has been the industry standard for more than 16 years is the Static 99, which looks at "static" or unchanging risk factors, and determines the probability of reoffense based on the recidivism rate of a group of offenders who score alike. A revised version of that instrument, the Static-99R, is now the most widely used actuarial instrument.[9] Further research in sex offender risk assessment has shown that consideration of "dynamic" risk factors (those changeable over time), helps evaluators identify sex offender treatment targets and evaluate recidivism risk.[10] Examples of such factors are sexual preoccupation,

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[9]Jackson, R. L., & Hess, D. T. (2007). *Evaluation for civil commitment of sex offenders: A survey of experts.* Sexual Abuse: A journal of Research and Treatment, 19, 409-48.

[10] Hanson, R. K. and Harris, A.J. (2000), *Where Should We intervene? Dynamic Predictors of Sexual Offense Recidivism.* Criminal Justice and Behavior, Vol. 27 No.1

meaningful relationships, self-management, and cognitive distortions. 1RP 530-31.

Psychologists and others conducting risk assessments have traditionally used their clinical judgment to consider and weigh dynamic risk factors, and our courts have consistently recognized that clinical consideration of such factors has been central to SVP evaluations. *See e.g. In re Detention of Jacobson*, 120 Wn. App. 770, 777, 86 P.3d 1202 (2004) (noting the evaluator's consideration of dynamic risk factors as part of an overall risk assessment); *In re Detention of Danforth*, 153 Wn. App. 833, 840, 223 P.3d 1241 (2009) (noting the evaluator's consideration of dynamic risk factors as part of an overall risk assessment); *In re Detention of Reimer*, 146 Wn. App. 179, 196, 190 P.3d 74 (2008) (noting the evaluator's use of dynamic risk factors commonly used in SVP evaluations, including poor history of interpersonal relationships, poor impulse control and negative attitudes toward therapeutic intervention); *In re Detention of Jones*, 149 Wn. App. 16, 22, 201 P.3d 1066 (2009) (evaluator opined that association with criminals or continued drug use would constitute elevation of dynamic risk).

The SRA-FV is based on empirical research and was created by one of the developers of the Static-99 to assist evaluators' clinical judgment with a more stable and analytic framework. The SRA-FV takes

factors previously considered by clinicians with unanchored clinical judgment and puts them in a structured construct based on empirical data, in order to achieve a more accurate risk assessment. Furthermore, the SRA-FV is not novel science because it was constructed implementing decades of generally accepted research on the subject of sex offender risk assessment, and it has been subject to peer review and validation.[11]

As the WSSC has observed: "[S]cience never stops evolving and the process is unending[,]" with each scientific inquiry becoming "more detailed and nuanced." *Anderson v. Akzo Nobel Coatings*, 172 Wn.2d 593, 607, 260 P.3d 857 (2011). If, however, courts require "'general acceptance' of each discrete and evermore specific part of an expert opinion, virtually all opinions based upon scientific data could be argued to be within some part of the scientific twilight zone." *Id.* at 611. The science of risk assessment is no exception to this rule. The courts of this state have long recognized that, despite this ongoing process of evolution, the underlying procedures and methods used to assess risk are well established and generally accepted.

[11] The irony in this appeal is that a method that is less scientifically based has been approved by the WSSC, but when researchers in the field tried to make the actuarial assessment more complete, Love claimed that the manner did not satisfy *Frye*. Had Dr. Phenix relied only on clinical judgment in reaching the same opinion there would have been no basis for a *Frye* hearing.

4. The *Frye* Hearing Below

The State submitted its Petitioner's Motion and Supporting Memorandum for a Finding that the SRA-FV Meets the *Frye* Evidentiary Standard. CP 590-804. Judge Swisher conducted the *Frye* hearing on May 19, 2014. 1RP 513-674. At the hearing the State relied on the testimony of Dr. Phenix to explain the development, general acceptance, and widespread use of the SRA-FV in the field of sex offender evaluation and assessment. 1RP 519-612. Dr. Phenix is a clinical psychologist specializing in forensic psychology. 1RP 519. She also specializes in sex offender risk assessment and has done so for approximately 20 years. 1RP 519-20. She has worked in a number of jurisdictions, including but not limited to Washington, California, Arizona, Illinois, Michigan, Wisconsin, Florida, New Hampshire, Massachusetts, and Iowa. 1RP 520. She has testified over 200 times in cases involving SVP evaluations. 1RP 520-21. Dr. Phenix is the clinical member of the Static-99 research team. 1RP 551.

Dr. Phenix explained that evaluators attempt to determine the risk that an offender will commit another offense if released. 1RP 522. They can do that by determining relative risk, i.e., low, medium and high risk. 1RP 522. Evaluators can also now arrive at general probabilities of risk for five- and ten-year periods. 1RP 522.

When Dr. Phenix began her career, there were no validated instruments for assessing risk. 1RP 522-23. Small, single-sample studies identified risk factors for reoffense, and the evaluator would consider them, evaluate whether they were present and in what strength, and then arrive at an opinion based on those conclusions. 1RP 523. This was known as a research-guided assessment. 1RP 532.

Beginning in 1998, actuarial instruments started becoming available. 1RP 527-28. Actuarial instruments for sex offenders combine risk factors linked to sexual recidivism. 1RP 523. Each factor is weighted statistically according to its contribution to risk. 1RP 523. A total risk score is arrived at, and from that the evaluator can determine a relative or general probability of risk. 1RP 523-24. These instruments made assessment more accurate by utilizing statistical weights instead of relying on clinical judgment of weight. 1RP 533. Actuarial instruments are validated; they are first developed on a group of offenders, then tested on a different group to see how the results compare. 1RP 524-25.

In 1998 Dr. Phenix began using the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR). 1RP 528. Next came the Static-99, which has been revised and is now known as the Static-99R. 1RP 528. The Static-99 was validated on a split sample. 1RP 528. It was

developed on half of an 8,100 person-sample, then validated on the other half. 1RP 528.

Static, or unchanging factors, do not tell an evaluator everything that can be known about a person's risk. 1RP 528. Beginning in the early 2000s, researchers identified dynamic, or changeable risk factors, as important considerations. 1RP 529. Dynamic risk factors are generally the targets of sex offender treatment. 1RP 529. Examples of such factors are sexual preoccupation, meaningful relationships, self-management, and cognitive distortions. 1RP 530-31. Like static factors, dynamic risk factors are identified through empirical research. 1RP 531-32.

As another step in the evolution of risk assessment, researchers have now developed instruments to measure dynamic risk factors. 1RP 533. There are currently three, soon to be four, such instruments, and the SRA-FV is one that at the time of the *Frye* hearing below had been in existence for about four years. 1RP 533. These are not considered actuarial instruments, because their items have not been statistically weighted for their contribution to risk, and no probabilities of reoffense can be derived from them. 1RP 535.

The SRA-FV has three categories, each having a number of items. 1RP 534. The categories are: sexual interests, relational style (how the person gets along with others), and self-management. 1RP 536. The items

within each category are scored as zero, one, or two. 1RP 535. As an example, one item in sexual interests is "sexual interest in children." 1RP 537. If the person appears to have no interest, the score is zero; if some interest, the score is one; and if significant interest the score is two. 1RP 537. From this scoring the evaluator achieves a total score, which will be low, medium, or high, and which will guide the evaluator in determining the appropriate probabilities for sexual reoffense from the Static-99R. 1RP 538-39.

Using the SRA-FV provides the most accurate way to assess an individual's risk, because the level of dynamic risk factors is closely associated with the level of risk for sexual reoffense. 1RP 539. This has become evident because, over time, research discovered that those with a particular score on the Static-99 did not reoffend at the same rate; some were high, some low, and some moderate. 1RP 540.

That research showed the following: When an offender in prison has never been preselected for a special procedure or measure, they are considered "routine." 1RP 541. Routine sex offenders are now known to have the lowest recidivism rates. 1RP 541. On the other hand, when prison treatment programs select individuals they deem riskiest in order to apportion their sexual offender treatment resources, that group of pre-selected individuals tend to have higher risk than the routine group.

1RP 541. There is also a third group, those that are identified as dangerous offenders, who tend to violate institutional rules and have problematic behavior, and they are known as the high risk/high needs group. 1RP 541-42. These three groups differ in their risk levels: Routine are lowest, preselected have higher risk, and high risk/high needs individuals have the highest risk. 1RP 542.

The SRA-FV, then, provides a score that assists in categorizing an offender as having low, medium, or high levels of dynamic risk. 1RP 542. With that measurement, the evaluator can determine whether to compare the person to the routine, preselected or high risk/high needs individuals. 1RP 542. Thus, the SRA-FV guides the evaluator to the most appropriate risk probabilities for an individual. 1RP 542-43.

Like the Static-99, the SRA-FV was developed and then cross-validated on a split sample. 1RP 544-46. While more cross-validations would be better, there are sufficient indications that it improves predictive accuracy that Dr. Phenix and evaluators in her field use it. 1RP 549-50. The SRA-FV has been determined to have "incremental validity." 1RP 546-47. That is, it has been shown to add new risk information and increase the total predictive accuracy of risk assessments. 1RP 546-47. Overall, Dr. Phenix opined, it is beneficial to use the instrument even with its limitations. 1RP 550. The developers of

the Static-99 also recommend using the SRA-FV to determine the Static-99 risk probabilities. 1RP 550-51.

Inter-rater reliability is a measurement of how consistently different evaluators produce the same score when using the instrument on the same person. 1RP 551. The limited research on inter-rater reliability shows lower than desirable. 1RP 552-53. Dr. Phenix opined that at this point it appears to be a training issue – "a flaw in the raters." 1RP 553-54. Yet, even with less than desirable inter-rater reliability, "we have got a very acceptable predictive accuracy for this instrument in the moderate range." 1RP 553. The SRA-FV is not a psychological test, and anyone trained on it can score it. 1RP 554-55.

Dr. Phenix addressed the issue that California had adopted use of the SRA-FV and then replaced it with another instrument. 1RP 555-57. Dr. Phenix was the consultant to the group that was legislatively required to choose the risk assessment instruments that would be mandated for use in California. 1RP 555-56. She clarified that the SRA-FV, developed on an incarcerated sample, had been replaced with another dynamic risk assessment instrument that was more appropriate for the parole population on which it was to be used, not because of any problem with the SRA-FV, which was developed on incarcerated individuals. 1RP 556-57.

The developer of the SRA-FV, Dr. David Thornton, published his results and documented the improved predictive accuracy and incremental validity that the SRA-FV provides, in a 2013 paper. CP 702-718 (Thornton, D. & Knight, R. (December 2013). *Construction and Validation of SRA-FV Need Assessment*, Sexual Abuse: A journal of Research and Treatment).

Love relied on the testimony of Theodore Donaldson, Ph.D. 1RP 613-658. Dr. Donaldson does not believe it is possible to identify a SVP through a structured risk assessment. 1RP at 656-58. He believes that the only required analysis is whether the person suffers from the mental abnormality defined at RCW 71.09.020(8). 1RP at 657. If the person has that condition, Dr. Donaldson opined, then they are likely to reoffend. 1RP at 657. Dr. Donaldson does not think that the various risk instruments add anything to the risk assessment process. 1RP at 657.

The trial court delivered an oral ruling on May 19, 2014, finding that the SRA-FV satisfied the *Frye* standard. 1RP 672-74. The court subsequently entered Findings of Fact and Conclusions of Law. CP 2-5. Specifically, Judge Swisher found that the SRA-FV provides a structured assessment of dynamic risk factors that it has been validated and is generally accepted in the scientific community. CP 3.

5. The WSSC Has Held That *Frye* Is Not Applicable To SVP Risk Assessments.

As a preliminary matter, the State continues to assert that a *Frye* hearing was unnecessary, because neither clinical judgment nor actuarial assessment in SVP proceedings is subject to *Frye*. *Thorell,* 149 Wn.2d at 754. *Frye*'s "'core concern ... is only whether the evidence being offered is based on established scientific methodology.'" *In re Detention of Young,* 122 Wn.2d 1, 56, 857 P.2d 989 (1993) (quoting *Cauthron,* 120 Wn.2d at 889). *Frye* requires "general acceptance," not "*full* acceptance[,]" *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994) (emphasis in original), and "can be satisfied by foundation testimony given in connection with the expert's testimony on the merits." Tegland, *Washington Practice: Evidence Law and Practice,* §702:21, at 100 (citing *In re Detention of Strauss,* 106 Wn. App. 1, 20 P.3d 1022 (2001)). "[T]he relevant inquiry under *Frye* is general acceptance within the scientific community, without reference to its forensic application in any particular case." *State v. Greene*, 139 Wn.2d 64, 71, 984 P.2d 1024 (1999). "Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if

scientific, technical, or other specialized knowledge will assist the trier of fact." *State v. Gregory,* 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006).

Because both actuarial and clinical predictions of future dangerousness satisfy *Frye,* they are admissible without a *Frye* hearing if they satisfy ER 401 through 403 and ER 702 through 703. *Ritter,* 177 Wn App. at 522-23 (*citing Thorell,* 149 Wn.2d at 754-56).

6. The Trial Court Did Not Err in Finding that the SRA-FV Satisfies the *Frye* Standard

Love argues that the trial court improperly determined that the *Frye* standard was met. The record, however, demonstrates the trial court followed the law and that its findings and conclusions are well-supported. Scientific testimony is admissible under *Frye* if a two part test is satisfied: (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part, and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 175, 313 P.3d 408 (2013). Evidence is admissible under *Frye* if the "science and methods are widely accepted in the relevant scientific community[.]"*Akzo*, 172 Wn.2d at 609. Courts do not evaluate whether the scientific theory is correct, but whether it has gained general

acceptance in the relevant scientific community. *State v. Riker*, 123 Wn.2d 351, 359-60 (1994). Courts examine expert testimony, scientific writings subjected to peer review and publication, secondary legal sources, and legal authority from other jurisdictions to determine whether a consensus of scientific opinion has been achieved. *Eakins v. Huber*, 154 Wn. App. 592, 599 (2010) (*citing Copeland*, at 256-57). Additionally, there is no numerical cut-off for determining the "reliable results" prong. *Lake Chelan Shores*, 176 Wn. App. at 175.

Moreover, the *Frye* standard does not require unanimity among scientists for evidence to be generally accepted. *Id.* at 176 (*citing State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). Rather, evidence is inadmissible under *Frye* only in cases where a significant dispute among qualified scientists in the relevant scientific community exists. *Akzo*, at 603. The relevant inquiry is whether the scientific testimony is generally accepted by scientists, not whether it is generally accepted by courts. *Cauthron*, 120 Wn.2d at 888.

A recent Division II opinion decided the precise issue before this Court. *Pettis*, 188 Wn. App. at 352. In *Pettis*, the trial court admitted evidence about the SRA-FV after conducting an evidentiary hearing and concluding the instrument satisfied the *Frye* test. 188 Wn. App. at 209-10. *Pettis* held that that the SRA-FV is both generally accepted in the

scientific community *and* uses acceptable methods in its application, therefore satisfying the *Frye* test. 188 Wn. App. at 210-11.

Pettis found – as did the trial court in the instant case – that the testimony of the State's expert, Dr. Phenix, and the scientific literature on the SRA-FV supported the conclusion that the SRA-FV is generally accepted. 188 Wn. App. at 209; CP 3-4. *Pettis* noted the existence of some criticism in the field, namely from defense witnesses Dr. Brian Abbott and Dr. Christopher Fisher, but stated the *Frye* standard "does not require unanimity." 188 Wn. App. at 209-10 (*citing Lake Chelan Shores*, at 176). Rather, *Pettis* holds "there does not appear to be a *significant* dispute about the acceptance of the SRA-FV," and therefore, the SRA-FV is admissible under *Frye*. *Id.* (emphasis in original).

Regarding the second prong, *Pettis* held there are generally accepted methods of applying the SRA-FV. *Id.* at 211. Specifically, the Court found that the SRA-FV "involves a specific training and a standard coding form." *Id.* at 210. Moreover, the Court did not find persuasive Pettis' argument that the SRA-FV's reliability rating fails the second prong of the *Frye* test. In rejecting that argument, the Court recognized "there is no numerical cutoff for reliability." *Id.* (*citing Lake Chelan Shores*, at 176). Rather, the court held that the "moderate predictability" of the SRA-FV is sufficiently reliable. *Id.*

In the instant case, as in *Ritter*, the State presented the testimony of Dr. Phenix. She testified that the SRA-FV has been cross-validated on a split sample. 1RP 544-46. It improves predictive accuracy such that Dr. Phenix and evaluators in her field use it. 1RP 549-50. It also has "incremental validity." 1RP 546-47. That is, it has been shown to add new risk information and increase the total predictive accuracy of risk assessments. 1RP 546-47. Even with its less than desirable inter-rater reliability, it has very acceptable predictive accuracy in the moderate range. 1RP 553. The SRA-FV has been published in a peer-reviewed journal. CP 702-718 (Thornton, D. & Knight, R. (December 2013). *Construction and Validation of SRA-FV Need Assessment*, Sexual Abuse: A journal of Research and Treatment).

Curiously, Love chose to rely on the testimony of an expert who does not accept even indisputably generally accepted risk assessment methods. Dr. Donaldson does not believe it is possible to identify a SVP through a structured risk assessment. 1RP at 656-58. He believes that the only required analysis is whether the person suffers from the mental abnormality defined at RCW 71.09.020(8). 1RP at 657. If the person has that condition, Dr. Donaldson opined, then they are likely to reoffend. 1RP at 657. Dr. Donaldson does not think that the various risk instruments

add anything to the risk assessment process, apparently believing them to be superfluous. 1RP at 657.

Notably, Judge Swisher concluded that Dr. Phenix is qualified to present expert testimony on the *Frye* issues. CP 4 (Conclusion of Law No. 1). He also found her to be credible. CP 3 (Finding of Fact No. 1). But he made no such finding or conclusion about Dr. Donaldson. Credibility determinations are for the trier of fact and this Court does not review them on appeal. *State v. Quigg*, 72 Wn. App. 828, 846, 866 P.2d 655 (1994); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is therefore a verity on appeal that Dr. Phenix is qualified and credible on the *Frye* issues, while the same cannot be said of Dr. Donaldson.

Based on this evidence, the trial court correctly found that *Frye* was satisfied. Judge Swisher reached the same conclusions as the *Pettis* court. CP 2-5. Specifically, he ruled that the testimony and supporting materials of Dr. Phenix show that dynamic risk factors are generally accepted in the scientific community as important risk considerations, and that the SRA-FV provides a structured approach to measuring them. CP 2-5. Love has failed to show the existence of a significant dispute within the scientific community, and has failed to show that the methods of applying the SRA-FV are not generally accepted.

Love argues that expert testimony regarding the SRA-FV should not be admissible under *Frye* because the SRA-FV has below ideal inter-rater reliability and cross-validation. Br. of App. at 43-47. As the trial court correctly concluded, Love's arguments speak to weight, not admissibility. CP 5. "The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology." *Cauthron,* 120 Wn.2d at 889.

Inter-rater reliability and cross-validation are not relevant to the question of whether or not the instrument is based on a generally accepted theory. Inter-rater reliability is also not a construct that is necessary to satisfy the *Frye* test. An instrument has high "inter-rater reliability" when practitioners get similar results when applying the instrument to common subjects. While Dr. Phenix conceded there are legitimate concerns about the SRA-FV's inter-rater reliability, she stated it is likely to improve as training becomes more standardized.

Finally, Love's assertion that the SRA-FV has not been cross-validated was proved incorrect by the testimony of Dr. Phenix, who emphasized that the instrument has indeed been cross-validated, on a split sample. 1RP 544-46. Nonetheless, cross validation is not a requirement of the *Frye* test. "Cross-validation" is the process by which a tool's usefulness is confirmed by applying it to a different group of subjects than

the one it was developed on. The SRA-FV was developed and validated on two separate groups of offenders from the same hospital from the 1960s through the 1980s.

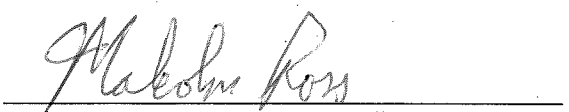
Therefore, while Love has pointed out perfectly valid criticisms addressing the weight the trier of fact should apply to testimony regarding the SRA-FV as evidence, he fails to identify how any of it speaks to *admissibility*. Judge Swisher properly concluded that it is generally accepted to use the SRA-FV to measure the level of dynamic risk factors in sex offenders. Furthermore, adding the information from the SRA-FV in order to select the Static-99 normative group adds predictive accuracy to the overall risk assessment. The trial court properly admitted evidence of the SRA-FV and Love's commitment should be affirmed.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Love's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 1st day of October, 2015.

ROBERT W. FERGUSON
Attorney General



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Attorneys for Respondent

APPENDIX 1

STANISLAUS COUNTY MUNICIPAL COURT
STATE OF CALIFORNIA

FILED
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THE PEOPLE OF THE STATE OF CALIFORNIA,
vs.
RONALD DALE LOVE
(AT LARGE)
NO. 30646 DEFENDANT

Complaint - Criminal

CPD 78-3162
78-3161

156010

State of California,
County of Stanislaus } ss.

Personally appeared before me, this 31st day of October 19 78

DON TILLEY, CERES POLICE DEPARTMENT

who, first being duly sworn, upon information and belief, makes complaint, and accuses RONALD DALE LOVE of having committed the crimes of CT.I: VIOLATION OF §261, Subdivision 3, CALIFORNIA PENAL CODE; CT.II: VIOLATION OF §288a, Subdivision (c); CT.III: VIOLATION OF §286(c), CALIFORNIA PENAL CODE; CT.IV: VIOLATION OF §261, Subdivision 3, CALIFORNIA PENAL CODE; CT.V: VIOLATION OF §288a, Subdivision (c); CT. VI: VIOLATION OF §286(c), CALIFORNIA PENAL CODE; CT.VII: VIOLATION OF §459, CALIFORNIA PENAL CODE; ALL FELONIES

as herein set forth, and deposes and says:

COUNT I: That said RONALD DALE LOVE on or about the 28th day of October 19 78, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, feloniously, and with force and violence, have and accomplish an act of sexual intercourse with and upon ALMA MERCEDES PIAZZA, a female person, who was not then and there the wife of said RONALD DALE LOVE, without the consent and against the will of the said ALMA MERCEDES PIAZZA, and she, the said ALMA MERCEDES PIAZZA, then and there resisted the accomplishment of said act of sexual intercourse but her resistance was then and there overcome by force and violence used upon and against the said ALMA MERCEDES PIAZZA by said defendant.

COUNT II: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully and feloniously participate in an act of oral copulation with ALMA MERCEDES PIAZZA, and did compel the participation of said person in said act by force, violence, duress, menace, and threat of great bodily harm.

COUNT III: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully and feloniously participate in an act of sodomy with ALMA MERCEDES PIAZZA, and did compel the participation of said pers n in said act by force, violence, duress, menace, and threat of great bodily harm.

2018-7L

COUNT IV: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, feloniously, and with force and violence, have and accomplish an act of sexual intercourse with and upon GERALDINE (NMN) LE MAY, a female person, who was not then and there the wife of said RONALD DALE LOVE, without the consent and against the will of the said GERALDINE (NMN) LE MAY, and she, the said GERALDINE (NMN) LE MAY, then and there resisted the accomplishment of said act of sexual intercourse but her resistance was then and there overcome by force and violence used upon and against the said GERALDINE (NMN) LE MAY by said defendant.

COUNT V: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, and feloniously participate in an act of oral copulation with GERALDINE (NMN) LE MAY, and did compel the participation of said person in said act by force, violence, duress, menace, and threat of great bodily harm.

COUNT VI: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully, unlawfully, and feloniously participate in an act of sodomy with GERALDINE (NMN) LE MAY, and did compel the participation of said person in said act by force, violence, duress, menace, and threat of great bodily harm.

COUNT VII: That said RONALD DALE LOVE on or about the 28th day of October, 1978, at and in the jurisdiction of the Stanislaus County Municipal Court, State of California, did willfully enter the building and residence occupied by ALMA MERCEDES PIAZZA, at 2553 Fourth Avenue, Ceres, County and State aforesaid, with the intent then and there and therein unlawfully and feloniously to commit theft.

All of which is contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the people of the State of California.

Said Complainant therefore prays that a warrant may be issued for the arrest of the said

RONALD DALE LOVE

and that ....he.... may be dealt with according to law.

Subscribed and sworn to before me this

31st day of October 19 78

Complainant

DON R. VERA, ACTING CLERK

Clerk

Deputy Clerk

EVS/sg

I hereby certify the foregoing instrument, consisting of 2 page(s), is a true and correct copy of the original on file in this office.

ATTEST: Dated: 10/28/13

Stanislaus County Superior Court

By _____ Deputy Clerk

APPENDIX 2

4

FORM CR : 90

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Stanislaus
Court ID: 5 0 | | |
BRANCH

FOR COURT USE ONLY
FILED
1978 DEC 21 AM 9 28
LEVI H. NELSON, CLERK
By D. Davis Deputy

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: RONALD DALE LOVE ☒ Present ☐ Not Present
AKA:

COMMITMENT TO STATE PRISON P.C. § 1170
ABSTRACT OF JUDGMENT CASE NUMBER: 156040

Hearing 12-20-78 (Mo. Day Yr.) Dept. No. 4 Judge Francis W. Halley Clerk Jo Ledaris
Reporter Rudy Garcia Counsel for People Donald N. Scott
Counsel for Defendant Dallas Cole Probation Number or Probation Officer Roy Orlando

1. Defendant was convicted of the commission of the following crimes:
☐ Additional counts are listed on attachment 1.a.

Count	Code	Section No.	Crime	Date of Conviction Mo. Day Yr.	Conviction by: Jury Trial	Court Trial	Plea	Count Stayed PC § 654	ENHANCEMENTS Charged and Found: PC § 12022 Firearm	PC § 12022.5	PC § 12022.6	PC § 12022.7 Injury	PC § 12022	PC § 12022.5	PC § 12022.6	PC § 12022.7	Additional term stricken due to circumstances in mitigation
1	PC	261 Subd 3	Forcible Rape	12-20-78			X										
4	PC	261 Subd 3	Forcible Rape	12-20-78			X										

2. A. Number of prior prison terms charged and found: ___ 667.5(c) felonies; ___ other than 667.5(c) felonies.
B. Punishment for prior prison terms stricken: ___ 667.5(c) felonies; ___ other than 667.5(c) felonies.
3. The crime with the greatest "principal" term of imprisonment (including § 12022-series enhancements) is:
A. ☒ In the present proceeding, Count 1 B. ☐ In a prior uncompleted sentence identified on next line.
(County / Case Number / Court Code / Section Number / Crime and Degree / Date of Conviction Mo. Day Year)
4. Defendant is sentenced on the crime with the greatest "principal" term to state prison for the ☐ lower ☐ middle ☒ upper base term of 5 / ___ years.
5. Unstayed and unstricken enhancements imposed:
A. ☐ Penal Code § 12022(a) ☐ Penal Code § 12022(b) ☐ Penal Code § 12022.5 ☐ Penal Code § 12022.7 . . . . ___ years.
B. ☐ Penal Code § 12022.6(a) ☐ Penal Code § 12022.6(b) . . . . ___ years.
C. ☐ Penal Code § 667.5(a) . . . . ___ years.
D. ☐ Penal Code § 667.5(b) . . . . ___ years.
E. Terms for consecutive sentences:
(1) ☐ Other convictions in the present case for felonies not listed in § 667.5(c) on counts ___ / ___ years.
(2) ☐ Other convictions in prior uncompleted sentences for felonies not listed in § 667.5(c)
(County / Case Number / Counts) ___ / ___ years.
(3) ☒ Other convictions in the present case for felonies listed in § 667.5(c) on counts 4 1 1/3 years.
(4) ☐ Other convictions in prior uncompleted sentences for felonies listed in § 667.5(c)
(County / Case Number / Counts) ___ / ___ years.
6. Concurrent Sentences (to be served with sentence on count identified on line 3):
A. ☐ For convictions of the present case, counts ___ B. ☐ For convictions of prior uncompleted sentence.
7. Of years imposed above on lines 4 through 5.E.(4), number of years stayed pursuant to California Rules of Court, Rule 447, to comply with Penal Code §§ 1170.1(a) [5-year limit] and 1170.1(f) [double-base-term limit] . . . . (6 1/3 years)
8. The total unstayed prison term imposed by this judgment is . . . . 6 1/3 years.
9. Execution of sentence imposed: A. ☒ at initial sentencing hearing B. ☐ at resentencing pursuant to decision on appeal
C. ☐ after revocation of probation D. ☐ at resentencing pursuant to recall of commitment (P.C. § 1170(d))
10. The court pronounced sentence on 12/20/78 (Mo. Day Yr.). Defendant is credited for time spent in custody, 51 total days, including:
Actual Local Time 51 P.C. § 4019(b) credit ___, State Institutions Time ___ (specify dates of admission and release in oral proceedings and minutes).
11. Defendant is remanded to the custody of the Sheriff to be delivered: ☒ forthwith ☐ after 48 hours, excluding Saturdays, Sundays and Holidays into the custody of the Director of Corrections at the Reception-Guidance Center located at ☐ Calif. Institution for Women – Frontera ☒ Calif. Medical Facility – Vacaville ☐ Calif. Institution for Men – Chino ☐ Other (specify) ___

CLERK OF SUPERIOR COURT
I hereby certify the foregoing to be a correct abstract of the judgment made in this action.
By Jo Ledaris Deputy
Date DEC 20 1978

This form is prescribed pursuant to Penal Code § 1213.5 to satisfy the requirements of Penal Code § 1213 (Abstract of Judgment and Commitment) for determinate sentences under Penal Code § 1170. A copy of probation report shall accompany the Department of Corrections' copy of this form pursuant to Penal Code § 1203c. A copy of the sentencing proceedings and any supplementary probation report shall be transmitted to the Department of Corrections pursuant to Penal Code § 1203.01. Attachments may be used but must be incorporated by reference.

Form Adopted by the Judicial Council of California Revised Effective October 1, 1978

ABSTRACT OF JUDGMENT-COMMITMENT
FORM CR 290

Pen C. 667.5, 1170, 1170.1, 1213.5, 12022, 12022.5, 12022.6, 12022.7

Pink original • Court File — Yellow copy • Department of Corrections — White copy • Administrative Office of the Courts

I hereby certify the foregoing instrument, consisting of 1 page(s), is a true and correct copy of the original on file in this office.

ATTEST: Dated: 10/28/13

Stanislaus County Superior Court

By _____ Deputy Clerk

APPENDIX 3

STATE OF WASHINGTON
FRANKLIN COUNTY SUPERIOR COURT

In re the Detention of: RONALD D. LOVE, Respondent.	NO. 01-2-50028-0 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COMMITMENT

This matter was tried to the Court on May 4, 5, and July 14, 15, and 18 – 20, 2005, pursuant to RCW 71.09 *et seq.*, to determine whether the respondent, Ronald Love, should be involuntarily civilly committed as a sexually violent predator (SVP). The Court heard the testimony of the following witnesses: The respondent, Mr. Love; A. T. (victim); Don Tilley (by videotaped deposition); Michael Excell; D. L. (victim, by videotaped deposition); Sergeant David Allen; Corporal John Probasco; Dr. Amy Phenix; Jacque Martinson; Dr. Robert Halon; and Dr. Richard Wollert. Having considered this testimony and the exhibits entered into evidence, as well as the arguments of counsel, the Court now enters the following:

I. FINDINGS OF FACT

1. On December 20, 1978, Mr. Love was convicted in the Superior Court of Stanislaus County, California, of two counts of Forcible Rape.

2. One of the victims of Mr. Love's 1978 offenses, A.T., testified at the SVP trial. The court finds her testimony to be credible. Mr. Love was a stranger to her. He orally, anally and vaginally raped her. During this crime, he repeatedly threatened to further harm her. His

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205

assault upon her ended when she escaped from him.

3. On May 14, 1991, Mr. Love was convicted in Franklin County Superior Court of Attempted Rape in the First Degree.

4. The victim of this 1991 offense, D.L., testified by videotaped deposition at the SVP trial. The Court finds his testimony to be credible. Mr. Love was a stranger to him. Mr. Love beat D.L. severely about the face and head, and attempted to anally rape him. While doing so, he repeatedly threatened to kill him.

5. When the State filed the petition herein, Mr. Love was incarcerated for his 1991 Attempted Rape conviction.

6. The expert testimony in this case was conflicted on whether Mr. Love suffers from a mental abnormality that causes him to have serious difficulty controlling his sexually violent behavior, and whether he is more likely than not to commit a sexually violent offense in the future if not confined. The Court finds the testimony of Dr. Amy Phenix to be credible, and accepts and believes her testimony on these material issues.

7. The Court is familiar with the Diagnostic and Statistical Manual of Mental Disorders (DSM), a classification system that lists mental illnesses and their symptoms. While not designed to meet legal standards, its use is commonly accepted in this Court and elsewhere as a standard reference by which mental health experts diagnose mental illnesses.

8. Paraphilias are pervasive, long-standing patterns of abnormal sexual arousal that are essentially life-long conditions. According to the diagnostic criteria of the DSM, they occur over a period of at least six months and cause the individual clinically significant distress or impairment in his social life, relationships, employment, schooling, or other important areas of functioning.

9. Dr. Amy Phenix diagnosed Mr. Love with the disorder classified in the DSM as Paraphilia Not Otherwise Specified (NOS) (Nonconsent). Mr. Love's experts disputed the

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validity of this diagnosis. Dr. Robert Halon testified that this mental disorder cannot be found in the DSM. He believed that Mr. Love's crimes were opportunistic and that he committed them by choice.

10. The Court finds that the diagnosis of Paraphilia NOS (Nonconsent) is a valid diagnosis that is commonly recognized and applied by mental health professionals in the field in which the experts in this case practice.

11. The Court further finds that the information relied upon by Dr. Phenix is the type of information reasonably relied upon by experts in her field. That information is extensive and supports her opinions.

12. Mr. Love suffers from Paraphilia Not Otherwise Specified (NOS) (Nonconsent). This condition causes him to have intense sexually-arousing urges and behaviors involving sexual contact with nonconsenting persons. He has committed rapes and an attempted rape of strangers, even during periods of time when he had a consensual sexual partner available to him. His urges and behaviors have led to his repeated incarcerations and have impaired almost every aspect of his life.

13. Mr. Love's Paraphilia NOS is a congenital or acquired condition affecting his emotional or volitional capacity which predisposes him to commit criminal sexual acts to a degree that makes him a menace to the health and safety of others.

14. Mr. Love's Paraphilia NOS causes him to have serious difficulty controlling his sexually violent behavior.

15. Additionally, Mr. Love suffers from Antisocial Personality Disorder. This diagnosis was not disputed. Nor was it disputed that Mr. Love's Antisocial Personality Disorder does not, in and of itself, predispose him to commit sexually violent offenses. There was also agreement that Mr. Love meets the criteria for classification as a psychopath.

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16. Mr. Love's Antisocial Personality Disorder contributes to his serious difficulty controlling his sexually violent behavior. He lacks sufficient conscience to respect and abide by the law, or to care to any significant degree about the harm he causes other people. His antisocial attitudes facilitate his commission of sexually violent offenses.

17. Mr. Love also suffers from Alcohol Dependence and Other Substance Abuse. While these conditions do not cause him to commit sexually violent crimes, they too facilitate his criminal behavior by disinhibiting him and impairing his judgment.

18. Mr. Love's risk of sexually reoffending was also disputed at trial. In conducting her risk assessment, Dr. Phenix relied in part on two actuarial instruments: the Static 99 and the Minnesota Sex Offender Screening Tool – Revised (MnSOST-R). Dr. Halon testified that these instruments were not useful for predicting Mr. Love's recidivism risk. Dr. Richard Wollert, who uses the Static 99, testified that the percentages associated with Mr. Love's score on that instrument must be significantly reduced because of Mr. Love's current age of 48 years. He testified that the MnSOST-R was an unreliable instrument.

19. The Court finds that the Static 99 and the MnSOST-R are commonly accepted and used by the community of experts who perform risk assessments of sexual offenders, and that the Static 99 is the most widely used.

20. On both instruments Mr. Love's score placed him into the high risk category. On the Static 99, Mr. Love's score indicated that he is statistically similar to a group of offenders who sexually recidivated at a rate of 52% over 15 years. On the MnSOST-R, which Dr. Phenix used to corroborate the Static 99 results, Mr. Love's score indicated that he was statistically similar to a group of offenders who sexually recidivated at a rate of 72% over six years. Both of these instruments tend to underestimate risk because they do not take into account undetected crimes.

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21. Dr. Wollert testified about his method of applying Bayes' Theorem to reduce the Static 99 percentages commensurate with Mr. Love's age. Dr. Wollert concluded that Mr. Love's recidivism risk was well below 50%. However, neither Dr. Phenix nor Dr. Wollert, at least in his pre-trial deposition, were aware of any other expert who used Bayes' Theorem to reduce the results of the Static 99 to account for age. Therefore, on the issue of the effect of Mr. Love's age on his recidivism risk, the Court assigns lower weight to Dr. Wollert's testimony than it does to Dr. Phenix's testimony.

22. In addition to her reliance on actuarial risk assessment, Dr. Phenix considered a number of additional static and dynamic risk factors not accounted for by the actuarial instruments, but which are supported by research. The presence of these additional risk factors heightens Mr. Love's risk for committing a new sexual offense.

23. As a result of his Paraphilia NOS and his other mental disorders, Mr. Love more probably than not will engage in predatory acts of sexual violence if released unconditionally from detention in this matter.

Based on the foregoing Findings of Fact, the Court hereby enters the following:

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and the Respondent in this cause.

2. The Findings of Fact enumerated herein have been proven beyond a reasonable doubt.

3. Dr. Amy Phenix is qualified to provide expert forensic psychological testimony on all relevant issues in this case.

4. Mr. Love's conviction for Attempted Rape in the First Degree in Franklin County Superior Court constitutes a sexually violent offense, as that term is defined in RCW 71.09.020(15).

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5. At least two of Mr. Love's prior offenses, including his sexually violent offense, have been predatory, as that term is defined in RCW 71.09.020(9), in that they were committed against strangers.

6. The Paraphilia NOS from which Mr. Love currently suffers is a mental abnormality as that term is defined in RCW 71.09.020(8).

7. Mr. Love's Paraphilia NOS and Antisocial Personality Disorder cause him to have serious difficulty controlling his sexually violent behavior. Mr. Love's disorders of Alcohol Dependence and Other Substance Abuse also contribute to his serious difficulty in controlling such behavior.

8. Mr. Love's Paraphilia NOS and Antisocial Personality Disorder make him likely to engage in predatory acts of sexual violence if he is not confined in a secure facility.

9. The evidence presented at trial proves beyond a reasonable doubt that Mr. Love is a sexually violent predator, as that term is defined by RCW 71.09.020(16).

Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters the following:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, RONALD D. LOVE, is a sexually violent predator as defined in RCW 71.09.020(16). Having so

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found the Court therefore ORDERS that the Respondent be committed to the custody of the Department of Social & Health Services for placement in a secure facility for control, care, and treatment until further order of this Court.

DATED this 15th day of August, 2005.

THE HONORABLE ROBERT G. SWISHER
Judge of the Superior Court

Presented by:

ROB MCKENNA
Attorney General

MALCOLM ROSS, WSBA #22883
Assistant Attorney General
Attorneys for Petitioner

Approved as to form only:

CARL SONDERMAN, WSBA #4111
Attorney for Respondent

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APPENDIX 4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON, Plaintiff, vs. **RONALD D. LOVE,** D.O.B.: 05/24/57 SID NO.: WA15019009 FBI NO.: 0644893P2 Defendant.	NO. 91-1-50024-9 JUDGMENT AND SENTENCE (State Institution) 91 9 50304 2

THIS MATTER, having come before the Court for a sentencing hearing, the State of Washington being represented by Ann Marie DiLembo, Deputy Prosecuting Attorney for Franklin County, the defendant, **RONALD D. LOVE**, appearing in person and with his attorney, Linda Edmiston, the defendant having been afforded an opportunity to make a statement on his own behalf and to present information in mitigation of punishment, the defendant having been asked if there was any legal cause why judgment should not be pronounced and none having been shown, and the Court having reviewed and considered the statements presented, the pre-sentence report, the arguments of counsel and the files and case records to date, and having been fully advised, makes the following:

FINDINGS OF FACT

A. CURRENT OFFENSES:

1. On April 9, 1991, defendant was found guilty by plea of guilty of the crime of:

ATTEMPTED RAPE IN THE FIRST DEGREE, [RCW 9A.28.020(1)(3)(b) and 9A.44.040], A Class "B" Felony, committed on or about January 8, 1991, in Franklin County, Washington; Incident No. 91-CF-01052;

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

B. CRIMINAL HISTORY:

1. The Court finds that the defendant has the following convictions which shall be counted as criminal history in computing the Offender Score:

Crime	Court/Cause No.	ADULT: Sentence Date	Felony Class	Parole/Release Date
1. Sex Perversion	Stanislaos County	08/23/73		
2. Armed Robbery	Stanislaos County	07/01/74		
3. A) Sodomy B) Assault with intent to commit rape	Stanislaos County	04/09/75		
4. Receiving Stolen Property	Stanislaos County	03/01/76		
5. Forcible Rape	Stanislaos County	10/31/78		
6. Forcible Rape	Stanislaos County	10/31/78		
7. Burglary in the First Degree	Stanislaos County	12/28/83		

2. The Court finds that the offender score, seriousness level, standard sentence range and maximum term for the current offense is as follows:

Offender Score	Seriousness Level	Standard Range	Maximum Term

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PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

16	XI	157.5 - 210 Months	20 years/ $50,000.00

3. The defendant is an offender who shall be sentenced to a felony term or a combination of terms of more than one year of confinement. Pursuant to RCW 9.94A.190 and RCW 70.48.400 defendant shall be committed to a state penal institution under authority of the Department of Corrections to serve the sentence herein imposed.

4. The defendant has previously served 116 days in confinement which was solely in regard to the offense for which defendant is being sentenced.

5. The Court finds the defendant is liable for restitution in the amounts and to those persons as hereinafter ordered.

JUDGMENT

Based upon the foregoing Finds of Fact and the files and records herein,

IT IS HEREBY ADJUDGED AND DECREED that the defendant is guilty of the crime of:

ATTEMPTED RAPE IN THE FIRST DEGREE, [RCW 9A.28.020(1)(3)(b) and 9A.44.040], A Class "B" Felony, committed on or about January 8, 1991, in Franklin County, Washington; as charged in the Information herein.

SENTENCE

IT IS THE SENTENCE AND ORDER of the Court that:

1. Commencing 5-14, 1991, the defendant shall serve a term of total confinement in the custody of the Department of Corrections as follows:

120 months.

2. Defendant shall be given credit for 116 days served

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PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

in total confinement for this offense, prior to date of this sentence.

3. Defendant shall pay to the Clerk of this Court:

(a) $ 420 00 Court costs;
(b) $ 100.00 Crime Victim Assessment
(c) $ TBD Restitution
(d) $ 400.00 Court appointed attorney's fees
(e) $_____ Fine
(f) $_____ Tri-City METRO Drug Enforcement Fund
(g) $_____ Franklin County Drug Fund

$ 920 00 TOTAL

Commencing one month after release from confinement, defendant shall pay not less than $ TBD per month to the Clerk of the court until the total monetary obligation is paid in full.

4. Upon receipt, the Clerk of the Court shall distribute restitution to the injured party or parties as follows:

$ TBD David Lair
1302 Babs
Benton City, WA. 99350

5. The Court hereby retains jurisdiction over defendant for the greater of ten (10) years from the date of this Judgment and Sentence or from defendant's last date of release from confinement pursuant to a felony conviction to assure payment of the above-monetary obligations, and the Department of Corrections shall be responsible for assuring defendant's compliance with this provision.

6. Having been convicted of a sex offense, Chapter 9A.44 R.C.W. requires that the defendant register with the Sheriff of the County in which he resides (a) within forty-five (45) days of establishing residence in Washington, or (b) if a current resident within thirty (30) days of release from confinement, if any, or (c) within thirty (30) days of sentencing if no confinement is ordered. The defendant, shall, upon registering with the Sheriff, provide the following information; name; address; place of employment; crime for which convicted; date and place of conviction; aliases

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Phone (509) 545-3543

used; and social security number. The Sheriff shall photograph and fingerprint the defendant. Any subsequent change of address within the county shall be submitted to the Sheriff in writing within ten (10) days of establishing the new address. Any change of address to a new county shall require full registration, as described above, with the sheriff of the new county within ten (10) days of establishing the new residence, as well as written notice of the change of address to the new county to the Sheriff with whom the person last registered.

7. Having been convicted of a sex offense under Chapter 9A.44 RCW, the defendant shall submit to the drawing of blood for purposes of DNA testing in accordance with Laws of 1990, Chapter 230, Section 3.

8. In addition to the other terms and conditions of this Judgment and Sentence, is sentenced to a period of community placement of either two years or up to the period of earned early release awarded pursuant to RCW 9.9A.150(1) and (2), whichever is longer, to begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release. If this court has sentenced defendant to the statutory maximum period of confinement, then community placement shall consist entirely of such community custody as defendant may become eligible. Any period of community custody actually served shall be credited against this term of community placement.

In addition to the other terms and conditions of this Judgement and Sentence, during the term of community placement, defendant shall abide by the following terms and conditions:

1. Report to and be available for contact with the assigned community corrections officer as directed.

2. Work at Department of Corrections approved education, employment, and/or community service.

3. Not consume controlled substances except pursuant to lawfully issued prescription.

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PROSECUTING ATTORNEY
FRANKLIN COUNTY
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4. Not unlawfully possess controlled substances.

5. Pay community placement fees as determined by the Department of Corrections.

The Court waives the imposition of the above-referenced conditions one (1) through five (5) listed hereafter: _____.

The Court also imposes the terms and conditions checked below:

[ ] 6A. Shall remain within the following described geographical boundary _____.

[ ] 6B. Shall remain outside of the following described geographical boundary _____.

[X] 7. Shall not have direct or indirect contact with the victims of this crime, David Lair.

[X] 8. Shall participate in sex offender treatment, or such other crime-related treatment or counseling services as directed by the assigned community corrections officer.

[X] 9. Shall not consume alcohol.

[ ] 10. Shall not commit the following offenses _____, and shall not _____, which are prohibitions relating to the crime for which defendant has been convicted.

[X] 11. Shall have prior written approval by the Department of Corrections of residence location and living arrangements.

[X] 12. Shall submit to a polygraph and/or penile plethysmograph as directed by the Community Correction's Officer.

Violations of any of the requirements, terms, or

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FRANKLIN COUNTY
P.O. Box 1160
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conditions of this Judgment and Sentence may be punished by confinement for a period of up to sixty (60) days for each violation, pursuant to RCW 9.94A.200(2), except that violation of the terms and conditions relating to community placement as set forth in this sentence that occur during the period of community custody shall be determined by the Department of Corrections as an inmate disciplinary hearing and the Department may order defendant to serve the remaining portion of the sentence in a more restrictive confinement status.

DONE IN OPEN COURT this 14 day of May, 1991.

SUPERIOR COURT JUDGE

Presented by:

Ann Marie DiLembo #17123
Deputy Prosecuting Attorney

FINGERPRINT FORM ATTACHED

DENNIS DEFELICE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
P.O. Box 1160
Pasco, Washington 99301-1160

Defendant LOVE, RONALD D. SID NO. WA15019009

Cause No. 91-1-50024-9 ORI

Date of Birth 05/24/57 OCA

Sex M OIN

Race Caucasian DOA

The below impressed fingerprints are those of the defendant, taken this 14th day of May, 1991, by the undersigned

Jailer, Franklin County Sheriff's Office

	INDEX	MIDDLE	RING	LITTLE
RIGHT HAND				

STATE OF WASHINGTON)
) ss.
County of Franklin)

CLERK'S ATTESTATION

I, BEVERLY FINKE, Franklin County Clerk and Ex-Officio Clerk of the Superior Court, hereby attest that the above impressed fingerprints are those of the defendant herein.

BEVERLY FINKE

CLERK

Deputy

I, Michael J. Killian, [illegible] by the laws of the State of Washington, [illegible] Superior Court of the State of Washington, in and for said County, do hereby certify that the foregoing is a true and correct copy of [illegible] appears on file of record in my office. IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this

1 day of Oct 20 13

MICHAEL J. KILLIAN

By _____ Deputy

NO. 32555-5-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of: RONALD LOVE, Appellant.	DECLARATION OF SERVICE

I, Joslyn Wallenborn, declare as follows:

On October 1, 2015, I sent via electronic mail, per service agreement, a true and correct copy of Brief of Respondent and Declaration of Service, addressed as follows:

Eric Nielsen and Casey Grannis
Nielsen, Broman, & Koch, PLLC
sloanej@nwattorney.net
nielsene@nwattorney.net
grannisc@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of October, 2015, at Seattle, Washington.

JOSLYN WALLENBORN